No. 06-142

In the Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI,
AKA M. CHERIF BASSIOUNI, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the maintenance of records pertaining to Middle Eastern organizations, including terrorist organizations, and an individual's contacts with them is "pertinent to and within the scope of an authorized law enforcement activity," within the meaning of the Privacy Act, 5 U.S.C. 552a(e)(7).

2. Whether the court of appeals erred in reviewing a classified declaration, where that declaration was proffered to the district court but that court chose not to examine it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 436 F.3d 712. The decision of the district court (Pet. App. 30a-41a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 30, 2006. A petition for rehearing was denied on April 27, 2006 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, governs federal agencies' collection, maintenance, use, and dissemination of information pertaining to individuals. See *Doe* v.

Chao, 540 U.S. 614, 618 (2004). The Act allows an individual to gain access to certain records about himself and request that the information in such records be amended if it is not "accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(1) and (2)(B)(i). As relevant here, the statute provides that a federal agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment * * * unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7).

The Privacy Act also provides individuals with "various sorts of civil relief" if the Government fails to comply with a statutory requirement. See *Doe*, 540 U.S. at 618. In many cases, an individual may request that an agency amend the records pertaining to him. See 5 U.S.C. 552a(d)(2)(B)(i) and (g)(1)(A). However, the FBI has exempted its records "compiled for law enforcement purposes" from those amendment provisions, 5 U.S.C. 552a(k)(2). See 28 C.F.R. 16.96(a)(1). An individual also may bring suit for money damages, alleging that an agency's failure to comply with any statutory requirement was "intentional and willful" and resulted in an "adverse effect" on the individual. See 5 U.S.C. 552a(g)(1)(D) and (4)(A).

2. In November 1999, petitioner requested from the FBI, pursuant to the Privacy Act, "any records concerning himself or his activities that were in [its] possession." Pet. App. 13a. In response, the agency released 49 pages of redacted material. *Ibid.* Those records revealed that, during the 1970s, petitioner had contact with various influential officials in Middle Eastern affairs, including Yasir Arafat, and that petitioner had sent letters to prominent Arab-Americans that urged an end to attacks on Israeli facilities in the United States.

See Complaint, Exh. A. The records also referred to a number of terrorist groups, including the Popular Front for the Liberation of Palestine, which the State Department has designated a foreign terrorist organization. Pet. App. 13a, 32a-33a. None of the records, however, concluded that petitioner was a member of a terrorist organization. *Id.* at 13a.

Petitioner subsequently requested that the FBI amend a number of the records. Pet. App. 13a, 33a. The FBI denied his request, *id.* at 13a-14a, but informed petitioner that he could file a "Statement of Disagreement" with the agency, setting forth the portions of the record to which he objected, *id.* at 14a. Petitioner did not file a Statement of Disagreement. *Ibid.*

Petitioner instead filed suit, alleging that the FBI violated the Privacy Act by maintaining records describing his First Amendment activities, and seeking to compel the FBI to expunge those records. Pet. App. 14a. The FBI responded that the records at issue were properly maintained because they are "pertinent to and within the scope of an authorized law enforcement activity" and, in particular, its ongoing investigation of terror threats in the Middle East. *Id.* at 16a-17a.

In support of its position, the FBI submitted the declaration of James M. Krupkowski, the Supervisory Special Agent and Chief Division Counsel of the FBI Chicago Field Office. See Pet. App. 17a, 34a. That declaration explained that petitioner's records were relevant to "current 'investigative interests'" because: (i) "investigation of terrorism is the FBI's top priority"; (ii) due to petitioner's contacts, "the FBI will continue to receive information about [him] and will need the records to provide [a] context with which to evaluate that new information"; and (iii) the "records are important for eval-

uating the credibility and veracity of the FBI's sources." *Id.* at 17a. The declaration further stated that "the exact relevance of [petitioner's] records [is] classified." *Ibid.* The FBI offered the district court a classified declaration by Mr. Krupkowski, which explained in more detail the agency's initial and continuing need for the records pertaining to petitioner. See *ibid.* Petitioner did not object to the district court's possible consideration of the classified material. *Id.* at 21a n.7. The district court, however, chose not to review the classified declaration. See *id.* at 17a, 20a-21a n.7.

The district court granted summary judgment for the FBI. See Pet. App. 30a-41a. The court held that the records were "compiled for law enforcement purposes," and were therefore exempt from the amendment procedures of the Privacy Act. *Id.* at 39a. The court further concluded that, if the FBI had violated Section 552a(e)(7), petitioner's remedy would be a suit for damages. See *id.* at 40a & n.1.

3. Petitioner appealed. Following oral argument, the court of appeals directed the FBI to make the classified declaration available to each member of the panel. See Pet. App. 20a n.7.

The court of appeals affirmed the district court's judgment. Pet. App. 1a-29a. The court held that the FBI did not violate Section 552a(e)(7) of the Privacy Act, because the records pertaining to petitioner's First Amendment activities were "pertinent to and within the scope of an authorized law enforcement activity"—that is, the agency's ongoing investigation of terror threats in the Middle East. *Id.* at 20a, 25a-29a. In particular, the court found that the records "are important for evaluating the continued reliability of [the FBI's] intelligence sources," and that they provide a "context for

evaluating th[e] new information" that is expected to arrive due to the "breadth of [petitioner]'s contacts with the Middle East." *Id.* at 26a.

The court rejected petitioner's contention that the FBI could retain the records at issue only if it was "currently involved in a law enforcement investigation of [petitioner]." Pet. App. 27a (emphasis omitted). The court observed that "no court that has considered the meaning of law enforcement activity in (e)(7) has interpreted the term so narrowly." *Ibid.* The court further concluded that the Privacy Act does not require law enforcement agencies "to purge, on a continuous basis, properly collected information with respect to individuals that the agency has good reason to believe may be relevant on a continuing basis in the fulfillment of the agency's statutory responsibilities." *Ibid.* "The Privacy Act," the court reasoned, "does not give any indication that Congress intended law enforcement agencies to begin from scratch with every investigation." *Ibid.*

The court also held that, even had the FBI violated Section 552a(e)(7), petitioner could not compel the amendment of his records, because those files were exempt from the amendment process. See Pet. App. 23a-25a. The court noted that, if the FBI violated the statute, petitioner could instead bring an action for damages. See *id.* at 24a.

Finally, the court rejected petitioner's argument that it was barred from considering the classified declaration. See Pet. App. 20a-23a n.7. The court noted that petitioner "had the opportunity in the district court to raise arguments against the FBI's submission." See *id.* at 21a-22a n.7. The court further explained that, even if the classified material had been examined by the district court, petitioner would have no greater claim to see the

classified material, so the court of appeals' review of the document did not prejudice petitioner. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. The Privacy Act generally prohibits agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment," unless, *inter alia*, the records are "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7). Petitioner seeks (Pet. 5-20) this Court's review of an alleged conflict in the circuits concerning the scope of that "law enforcement activity" exception. There is no such conflict.

While petitioner identifies (Pet. 7-19) a handful of appellate cases that generally describe the content of the "law enforcement activity" exception, that discussion demonstrates nothing more than that courts sometimes employ different language in describing what constitutes a law enforcement activity. See *Jabara* v. *Webster*, 691 F.2d 272, 280 (6th Cir. 1982) (records must be "relevant to an authorized criminal investigation or to an authorized intelligence or administrative one"), cert. denied, 464 U.S. 863 (1983); *Clarkson* v. *IRS*, 678 F.2d 1368, 1375 (11th Cir. 1982) (information should be "[]connected to an[] investigation of past, present or anticipated violations of the statutes which [the agency] is authorized to enforce").

Other courts have eschewed any comprehensive definition, and have addressed the exemption's application on a case-by-case basis. See *Wabun-Inini* v. *Sessions*,

900 F.2d 1234, 1246 (8th Cir. 1990) (finding law enforcement exception applicable to FBI investigation, but otherwise "delay[ing] a closer scrutiny of the law enforcement exemption until the issue is more carefully framed and necessary to the decision"); *Patterson* v. *FBI*, 893 F.2d 595 (3d Cir.) (case-specific application of exemption), cert. denied, 498 U.S. 812 (1990); *MacPherson* v. *IRS*, 803 F.2d 479, 484 (9th Cir. 1986) ("declin[ing] to fashion a hard and fast standard for determining whether a record * * * is pertinent to and within the scope of an authorized law enforcement activity," and instead "elect[ing] to consider the factors for and against the maintenance of such records * * * on an individual, case-by-case basis") (internal quotation marks omitted).

Petitioner fails to demonstrate, however, that those courts' slightly different articulations or approaches have resulted in any material distinction in outcomes or, more particularly, would have resulted in a different ruling in this case. And the fact that there have been less than a dozen court of appeals cases addressing the exception over the last quarter century, and even then at such a broad level of generality, completely undermines petitioner's claim (Pet. 5) of "utter chaos" in circuit law.

Petitioner's reliance on *J. Roderick MacArthur Foundation* v. *FBI*, 102 F.3d 600 (D.C. Cir. 1996), cert. denied, 522 U.S. 913 (1997), and *Becker* v. *IRS*, 34 F.3d 398 (7th Cir. 1994), is even further misplaced. Those cases addressed whether the exemption applies to records that were originally collected as part of a "law enforcement activity," but that are not pertinent to any *current* law enforcement activity. See *MacArthur Found.*, 102 F.3d at 605 ("The Act does not require an

agency to expunge records when they are no longer pertinent to a current law enforcement activity."); *Becker*, 34 F.3d at 409 ("any thought that [the material] could be helpful in future enforcement activity concerning the Beckers is untenable").

Those decisions have no relevance to this case because the court expressly found a current and ongoing law enforcement role for petitioner's records based on their relevance to the FBI's continuing investigation of terror threats in the Middle East and the credibility of intelligence sources on such matters. Pet. App. 26a. The courts of appeals have consistently held that such law-enforcement intelligence purposes fall within the Section 552a(e)(7) exception. See, *e.g.*, *Patterson*, 893 F.2d at 600-601, 603 (protecting national security); *Nagel* v. *United States Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 n.3 (D.C. Cir. 1984) ("authorized intelligence" activities) (quoting *Jabara*, 691 F.2d at 280); cf. *Clarkson*, 678 F.2d at 1375 (records must be relevant to the "investigation of past, present or anticipated violations of the statutes which it is authorized to enforce").[1]

2. Petitioner also seeks (Pet. 20-23) this Court's review of the court of appeals' consideration of a classified declaration that was proffered to, but not considered by, the district court. That record-bound disagreement with the court of appeals' discretionary judgment does not merit this Court's review.

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[1] Petitioner's suggestion (Pet. 11) of an internal conflict within the Seventh Circuit is both wrong, see Pet. App. 28a (distinguishing *Becker*); *id.* at 42a-43a (denying rehearing en banc), and beside the point, as this Court generally does not sit to harmonize intra-circuit conflicts.

Petitioner objects (Pet. 21-22) that the declaration was not part of the record. But the declaration was proffered in district court, see Pet. App. 17a, 20a-21a n.7, which made it effectively part of the record and provided petitioner full notice of the document's existence and the opportunity to object. See, *e.g.*, *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (relying on classified material that had been offered to, but not considered by, the district court), cert. denied, 540 U.S. 1218 (2004); *McClendon* v. *Indiana Sugars, Inc.*, 108 F.3d 789, 795 (7th Cir. 1997) (noting that material used on appeal should be first "proffered to the district court"); cf. *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("[T]he court has inherent authority to review classified material *ex parte*, *in camera* as part of its judicial review function."), cert. denied, 543 U.S. 1146 (2005). In any event, there is no indication in the court's opinion that it relied on the classified declaration or that the case would have come out differently had the declaration not been submitted. Absent substantial prejudice, there is no error for this Court to remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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